

Order

Entered: July 15, 2004

Michigan Supreme Court
Lansing, Michigan

122021

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

BENJAMIN A. PHILLIPS,
Defendant-Appellant.

SC: 122021
COA: 230897
Wayne CC: 99-009754

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

On order of the Court, leave to appeal having been granted, and the Court having heard oral argument on May 13, 2004, we AFFIRM the May 28, 2002 judgment of the Court of Appeals and the defendant's conviction of assault with intent to do great bodily harm less than murder. MCL 750.84. Our decision in *People v Cornell*, 466 Mich 335, 367 (2002), applies only to cases pending on appeal in which the issue has been raised and preserved, and to cases arising after *Cornell*. In this case, the defendant did not preserve the issue because he did not object to the prosecutor's request that the trial judge consider convicting defendant of the assault offense. Under pre-*Cornell* law, it would have been proper to instruct a jury on, or for the judge in a bench trial to consider, assault with intent to do great bodily harm less than murder as a cognate offense of the charge of first-degree criminal sexual conduct. Here, the evidence supported conviction of the cognate offense. See *People v Jones*, 395 Mich 379, 390 (1975).

TAYLOR, J., states as follows:

I concur in the result only because I believe that the amendment to the information after the close of proofs was an unpreserved constitutional error subject to harmless error analysis. See *People v Chamblis*, 395 Mich 408, 418 (1975); *People v Carines*, 460 Mich 750, 763-766 (1999). However, I would hold that the error was harmless in this case.



I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 15, 2004

[Signature] Clerk